SHELL (M) TRADING SDN. BHD.

v.

MERIAM YAACOB & ORS.

HIGH COURT MALAYA, KUANTAN
VC GEORGE J
[CIVIL SUIT NO. 129 OF 1982]
10 FEBRUARY 1983

LAND LAW: *Sale of land by private treaty - Order of - Prohibitory order against registration - Whether should be set aside - Interest of judgment debtor - Beneficial interest only - Peremptory order - Breach by parties - Effect of.*

Mohamed Kunjoo had obtained an order for the sale of, *inter alia*, the land registered in the name of Meriam binti Yaacob, a partner of the judgment debtor, K.K. Enterprise. Union Chemicals Sdn. Bhd. successfully applied to intervene on the ground that Meriam held the land in trust for Union. Stay of execution was ordered. At a summons for directions in respect of the further conduct of the execution proceedings, Union was ordered to file a 'defence' and in the event Union did not proceed as directed, the execution was to be proceeded with. No defence was filed. A caveat lodged by Union was ordered to be removed. An order for sale of the land by private treaty was made but registration of transfer could not be effected because Shell Malaysia Trading Sdn. Bhd. had caused a prohibitory order in respect of the land to be registered on the ground that Meriam held the land in trust for Union. Shell issued a writ seeking a declaration that the land was so held in trust. Mohamed Kunjoo applied to set aside the writ on the grounds that Shell had no *locus standi* and/or that the writ was an abuse of the process of Court. He applied successfully for an order that the prohibitory order be removed from the register, the transfer completed, certain payments made and the balance of the proceeds of the sale be held by the Court. He then applied for the balance of the purchase price to be handed over to him.

Held:

[1] Shell had a right to move against the land concerned by registering the prohibition order under s. 334, National Land Code, though their judgment debtor, Union, had no registered interest in the land, the registered proprietor whereof being Meriam. A judgment creditor of the equitable owner may move against the land although the equitable owner does not have a registered interest in the land if the trust that created the equity is perfect and complete. (Case reported in [1935] MLJ 287 distinguished. *Boase v. Chung Rubber Estate Ltd.* [1913] 2 FMS LR 130; *The Motor Exporium v. Arumugam* [1933] MLJ 276; *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 117).

[2] Union had lost forever the right to establish their claim as against Mohamed Kunjoo to the property as a result of their breach of the order in respect of the conduct of the claim. Even in a case of dismissal of an action for inordinate delay *simpliciter* and not only for intentional and contumelious conduct amounting to an abuse of the process of Court, any fresh action taken out by the plaintiff would be liable to be struck out as an abuse of the process of Court. (Order 34 r. 8(2), Rules of the High Court; *Toh Hock Thye & Ors. v. Toh Chwee Blow* [1982]1 MLJ 152).

[3] However, the breach had not the effect of extinguishing Union's alleged interest in the land or of precluding them from moving to establish their alleged equitable rights to the land in proceedings involving parties other than Mohammed Kunjoo. The effect of the breach was *in personam* only.

[4] Therefore, as Shell itself had not been guilty of such conduct as would make their execution proceedings an abuse of the process of Court, the contention by Mohamed Kunjoo that the writ in that action be set aside must fail.

[5] The other contention that Shell had no *locus standi* had no merits. Shell as creditors of Union had an interest to establish the interest of Union in the land.

[Both applications of Mohamed Kunjoo dismissed. The issue of entitlement to the balance of the purchase price of the land to be adjudicated upon after disposal of Shell's action.]

Cases referred to:
Boase v. Chung Rubber Estate Ltd. [1913] 2 FMS LR 130
The Motor Exporium v. Arumugam [1933] MLJ 276
Karuppiah Chettiar v. Subramaniam [1971] 2 MLJ 117
Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 QB 229
Birkett v. James [1978] AC 297
Spring Grove Services Ltd. v. Deane [1972] 116 SJ 844
Tolley v. Morris [1979] 1 WLR 592
Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152

Legislation referred to:
Land Code 1926 (FMS), s. 108
National Land Code 1965, s. 334
Rules of the High Court, O. 19 r. 1, O. 25 r. 1(4), O. 34 r. 2(2)
Rules of the Supreme Court, O. 36 r. 11A(2) (now Rules of the High Court O. 34, r. 8(2))

For the plaintiff - S. Sivasubramanian; M/s. S. Sivasubramanian
For the defendant (Mohammed Kunjoo) - Shah Balendran; M/s. Balendran Chong & Bodi

JUDGMENT

VC George J:

On 31 March 1978 in Kuantan High Court Civil Suit No. 336/77 Mohamed Kunjoo Abdul Aziz (Mohamed Kunjoo) obtained judgment against K.K. Enterprise (sued as a firm) in the sum of RM60,000 with interest and costs. Mohamed Kunjoo followed up with the execution proceedings (Application for Execution No. 59/78) and on 13 October 1978 obtained an order for the sale of *inter alia* the whole of the land held under M.G. 838 for lot 5965 Mukim of Kuala Kuantan the registered owner whereof was one Meriam binti Yaacob, a partner of the judgment debtor K.K. Enterprise.

By an application dated 5 December 1978 Union Chemicals Sdn. Bhd. (Union) successfully applied to intervene in the application for execution in respect of the said land on their contention that in fact Meriam held the land in trust for Union. They were made an additional defendant in the application for execution and an order for stay of the sale of the land was made presumably pending the hearing and disposal of Union's contention that Meriam was only a trustee of the land and had no beneficial interest in it and that the order for the sale should be set aside.

There was an appeal against the order allowing Union to intervene but eventually the appeal was withdrawn.

Then followed a period of inactivity until a summons for direction in respect of the further conduct of the execution proceedings was taken out by Mohamed Kunjoo which was heard on 16 February 1981. All parties were represented by Counsel and *inter alia* it was ordered that the intervenor, Union state its claim to the land by filing a "defence" before 9 March

1981 and that the plaintiff, Mohamed Kunjoo, file his "reply" before 30 March 1981. This would have settled the issues for trial between Mohamed Kunjoo and Union. It was also ordered that "in the event of the Intervenor/defendant not proceeding as directed the stay of execution shall be deemed to have been rescinded and execution shall be proceeded with."

No "defence" as directed or at all was filed by or on behalf of the Intervenors.

Earlier, Union presumably to protect its alleged interest in the land had lodged a caveat against the land. Union not having proceeded with their claim in the execution proceedings, on 10 February 1982 at the instance of Mohamed Kunjoo an order was made by the Court removing the caveat with which removal the road was thought clear to proceed with the sale of the land by auction as ordered on 13 October 1978. At this stage Mohamed Kunjoo again moved the Court for an order that in lieu of the public auction the land be sold by private treaty to the trustees of a Hindu Temple, who had come forward with what was held out to be reasonable offer. The Court was prevailed upon to grant the order.

The sale by private treaty was proceeded with as directed by the Court. The purchasers deposited the full amount of the purchase price of RM200,000 and Malayan Building Society Bhd. (MBSB) to whom the land had been earlier charged by Meriam to secure a loan, executed and delivered a discharge of charge together with the title deed to the land to the solicitors for Mohamed Kunjoo (who were charged with the conduct of the sale) on their undertaking to pay out to MBSB from the said RM200,000 such amounts still due and owing by Meriam to them (some RM101,000).

However, there was then discovered an impediment to the registration of the memorandum of transfer transferring the land to the trustees of the Temple in that Shell Malaysia Trading Sdn. Bhd. had caused a prohibitory order in respect of the land to be registered with the land office on 23 February 1982.

Shell had obtained a judgment against Union Chemicals Sdn. Bhd. for some RM62,000 and consequent thereto had taken out execution proceedings (Kuantan Application for Execution No. 4 of 1982) pursuant to which the prohibitory order in respect of the said land was obtained and duly registered at the land office. Shell had moved against the land on the basis that Meriam the registered owner, in fact held it in trust for Union, their judgment debtor.

On 6 May 1982 Shell caused a writ to issue (Kuantan High Court C.S. No. 129/82) against Meriam, Union, MBSB and Mohamed Kunjoo seeking a declaration that the land at all relevant times was held by Meriam in trust for Union absolutely. The writ was served on Mohamed Kunjoo's solicitors on 16 June 1982 who without obtaining leave to do so entered a conditional appearance to the writ. They then proceeded with an application dated 2 July 1982 to set aside the writ on the grounds that "the plaintiff has no *locus standi* and/or as being an abuse of the process of Court." This application is encl. (12) in the Court's file.

In the meantime, Mohamed Kunjoo took out originating summons No. 45/82 against Shell for an order that "the writ of seizure and sale and Prohibitory Order dated 23 February 1982 ... by Shell ... be removed from the Register," On 17 June 1982 when O.S. 45/82 was called I had before me Encik Shah Balendran of Counsel for Mohamed Kunjoo, Encik S. Sivasubramanian of Counsel for Shell and Encik Gandhi K. Singam of Counsel for MBSB. Encik Shah Balendran proposed that, in view of the state the sale of the land had reached where the purchasers had borrowed the necessary funds and had deposited the full amount of the purchase price and MBSB had provided a discharge of charge, the prohibitory order at the instance of Shell should be vacated and the purchasers be registered as proprietor of

the land; MBSB to whom some RM101,000 was owing and the Majlis Perbandaran Kuantan to whom some RM4,539.80 was owing as arrears of assessment in respect of the land be paid what was due to them and the balance of the RM200,000 be held by the Court "until the finalisation of O.S. No. 45 of 1982."

Encik Gandhi K. Singam naturally had no objection to the proposal. Encik S. Sivasubramanian no doubt having in mind the number of technical and other objections his clients had taken was not prepared to consent to the proposal but accepting the proposal as being a pragmatic solution to the impasse, stated that while he was not prepared to consent to the proposal, was raising no objection thereto. The order of 17 June 1982 (Encl. (19)) substantially in the terms of the said proposals by Encik Shah Balendran, was made.

Mohamed Kunjoo has now taken out the application (encl. (15) in O.S. 45 of 1982) which in effect is for a decision that the balance of the purchase price of the land held by the Court be given over to him towards satisfaction of the judgment he has against K.K. Enterprise. Shell's contention is that the monies should be paid over to them towards satisfaction of their judgment against Union. They contend that no disposition of the monies be made until after the disposal of C.S. 129/82.

I heard encl. (15) in O.S. 45 of 1982 and encl. (12) in C.S. 129 of 1982 (referred to hereabove) together.

In C.S. 129 of 1982 there are 4 defendants of whom the first, Meriam apparently is dead, the second, Union, had purported to enter an appearance but this was done irregularly in that although they are a company incorporated under the Companies Act they did not enter their appearance through solicitors, the third is MBSB who had ceased to have any interest in the matter, and the fourth is Mohamed Kunjoo.

The arguments I heard were by Encik Sivasubramanian for Shell and by Encik Shah Balendran for Mohamed Kunjoo. Union was not present and not represented. Counsel for MBSB had asked for his absence to be excused. The estate of Meriam was not represented.

The gist of Encik Shah Balendran's contention was that Union had been given an opportunity of substantiating their claim to the land registered in Meriam's name when they were allowed to intervene in Application for Execution No. 59 of 1978; the Court had made a peremptory order in respect of the conduct of the claim by Union when it gave directions on 16 February 1981; there was a breach of that order (to file an affidavit support of their claim) and Union thereby lost such rights they had, to make their claim; Union is not entitled to revive their claim and neither can Shell whose right to move against the land depends on whether Union is entitled to establish their claim to the land.

Encik Shah Balendran also submitted that in any event a prohibitory order cannot be registered in respect of the beneficial interest of a person who does not have a registered interest for which proposition he cited the case reported as *Reference by Registrar of Titles Selangor* in the 1935 MLJ 287.

In reply to the latter submission, Encik Sivasubramanian contended that the 1935 judgment was based on an interpretation of s. 108 of the F.M.S. Land Code of 1926 which refers to "any land or any registered interest in land "... whereas the equivalent section in the National Land Code is s. 334 which refers to "land or an interest in land ..." The omission of the word "registered" before "interest", he submitted, was significant.

I am of the view that there is merit in Encik Sivasubramanian's submission on this point. *Boase v. Chung Rubber Estate Ltd.* [1913] 2 FMS LR 130, *The Motor Exporium v. Arumugam* [1933] MLJ 276 and *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 117 make the position clear. Although a person is the registered proprietor of land if in fact he had given up his interest in the land and was a bare trustee for the equitable owner, a judgment creditor of such a trustee may not move against the land simply because the judgment debtor happens to be the registered proprietor.

It follows, and I so hold, that a judgment creditor of the equitable owner may move against the land although the equitable owner does not have a registered interest in the land if the trust that created the equity is perfect and complete.

I now come to the former of Encik Shah Balendran's two submissions.

Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 QB 229 was an appeal (involving three cases) against the order of the Court of 1st instance striking out the cases for want of prosecution on the part of the plaintiffs. The plaintiffs themselves had wanted to press on with their case but their legal advisers delayed taking the necessary steps.

It was urged on the Court of Appeal that the Courts should not strike out a man's action without trial because it meant depriving him of his right to come to the Queen's Court. To this Lord Denning said (p. 245 of the report).

> Magna Carta was invoked against us as if we were in some way breaking its provisions. To this there is a short answer. The delay of justice is a denial of justice. Magna Carta will have none of it. To no one will we deny or delay right or justice.
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> All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time. Dickens tells how it exhausts finances, patience, courage, hope. To put right this wrong, we will in this Court do all in our power to enforce expedition; and, if need be, we will strike out actions when there has been excessive delay. This is a stern measure. But it is within the inherent jurisdiction of the Court. And the Rules of the Court expressly permit it. It is the only effective sanction they contain. If a plaintiff fails within the specified time to deliver a statement of claim, or to take out a summons for directions, or to set down the action for trial, the defendant can apply for the action to be dismissed. see RSC (Rev. 1965), O. 19, r. 1; O. 25, r. 1; O. 34, r. 2.

The equivalent rules in our Rules of the High Court are O. 19 r. 1; O. 25 r. 1(4) and O. 34 r. 2(2).

The question that could arise from a dismissal of an action for want of prosecution is whether the plaintiff is prevented from filing a fresh action. This question was considered by the House of Lords in *Birkett v. James* [1978] AC 297. Lord Diplock referred (at p. 318) with approval to the principles (laid down in *Allen v. McAlpine*) on which the inherent jurisdiction of the Courts to dismiss an action for want of prosecution should be exercised *viz:*

> The power should be exercised only where the Court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the Court or conduct amounting to an abuse of the inexcusable delay on the part of the plaintiff or his lawyers, and (2) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

At p. 320 Lord Diplock went on to say,

> Crucial to the question whether an action ought to be dismissed for want of prosecution before the expiry of the limitation period is the answer to a question that lies beyond it, *viz.* whether a plaintiff whose action has been so dismissed may issue a fresh writ for the same cause of action. If he does so within the limitation period, the effect of dismissing the previous action can only be to prolong the time which must elapse before the trial can take place beyond the date when it could have been held if the previous action had remained on foot. Upon issuing his new writ the plaintiff would have the benefit of additional time for repeating such procedural steps as he had already completed before the action was dismissed. This can only aggravate; it can never mitigate the prejudice to the defendant from delay.

Then came an analysis of the whole position resulting in the laying down of *inter alia* the following principles:

(1) Where the power (to dismiss for want of prosecution) is exercised pursuant to the first principle laid down in *Allen v. McAlpine* i.e, for intentional and contumelious conduct amounting to an abuse of the process of Court the plaintiff will not be allowed to bring a fresh action for the same cause of action.

The illustration provided by Lord Diplock for contumelious conduct is the disobedience of peremptory order made by the Court for the conduct of the action. In respect of conduct amounting to an abuse of Court reference was made to the facts (and the judgment) in *Spring Grove Services Ltd. v. Deane* [1972] 116 SJ 844.

Where an action has been dismissed for contumelious conduct the bringing of a fresh action for the same cause is an abuse of the powers of Court. See Lord Diplock in *Tolley v. Morris* [1979] 1 WLR 592, 603.

(2) Where the action is dismissed for inordinate delay and where limitation has not set in the plaintiff cannot be prevented from proceeding with a fresh action.

Lord Diplock in effect recommends that for inordinate delay *simpliciter* and where limitation has not set in, the Courts could not dismiss the action for want of prosecution but should impose peremptory orders for the further conduct of the matter and upon disobedience thereto apply the first principle laid down in *Allen v. McAlpine.*

However, as a result of amendments to our rules (O. 36, r. 11A(2) of the old Rules of Supreme Court, now O. 34 r. 8(2) of the Rules of High Court) the aforesaid recommendation of Lord Diplock has no application in our Courts. See the judgment of the Federal Court in *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152.

It seems to me that even in a case of a dismissal of an action for inordinate delay *simpliciter*, in the event the plaintiff takes out a fresh writ for the same cause, such fresh action would be liable to be struck out as an abuse of the process of Court.

Applying these principles to the situation in the instant case it is clear that as against Mohamed Kunjoo certainly, Union have lost forever the right to establish their claim to the property, the registered proprietor whereof is Meriam.

But it is not Union that now seeks to establish their equitable ownership to the land but Shell, a creditor of Union. Encik Sivasubramanian argues that at best the breach of the peremptory orders prohibits Union and Union alone, from reviving their claim to the land.

In my judgment the breach of the peremptory orders has not had the effect of extinguishing Union's alleged interest in the land. The effect of the breach is limited to a prohibition by Union from pursuing with the claim to the equitable ownership of the land as against Mohamed Kunjoo's attachment of the land pursuant to execution proceedings.

Assume for a moment that sometime after the breach of the aforesaid peremptory orders but before the sale of land K.K. Enterprise, the judgment debtor of Mohamed Kunjoo manages to pay and settle the amount owing to Mohamed Kunjoo. Would Meriam (or if she is in fact deceased, her estate) at that stage be allowed to lay claim to the beneficial interest in the land as against Union and prevent Union from opposing the claim on the grounds of the breach by Union of the peremptory orders in the execution proceedings earlier instituted by Mohamed Kunjoo? In my judgment the answer to that question has to be in the negative. It is the revival of the stand taken by Union against the execution proceedings by Mohamed Kunjoo that will be an abuse of the process of Court and as such will not be allowed. Union is not precluded from moving to establish their alleged equitable rights to the land in proceedings involving parties other than Mohamed Kunjoo. The position obtaining in respect of the land *vis-a-vis* Mohamed Kunjoo and Union is *in personam* as it were and not *in rem* and does not affect Shell.

And as Shell has not itself been guilty of intentional and contumelious conduct or such other conduct that would make their execution proceedings, against what they contend is Union's interest in the land, the registered proprietor whereof is Meriam, an abuse of the process of Court, the contention by Mohamed Kunjoo in his application (encl. (12)) in C.S. 129 of 1982 that the writ in that action should be set aside fails. The other contention that Shell has no *locus standi* to have caused the writ to issue does not appear to have been seriously purused and in any event has no merits. Shell as creditors of Union clearly have an interest to establish the interest of Union in the land.

Accordingly the application (12) in C.S. 129 of 1982 is dismissed with costs.

As to Mohamed Kunjoo's application encl. (15) in O.S. 45 of 1982 prayers (i) and (ii) are dismissed with costs. I order that the issue of entitlement of the balance of the purchase price of the land held in the name of the Senior Assistant Registrar, High Court Kuantan in the Hongkong & Shanghai Banking Corpn. Kuantan be adjudicated upon after the disposal of C.S. 129 of 1982.

Also found at [1983] 2 CLJ 145